

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1500

To be argued by
LAWRENCE K. FEITELL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

FRED R. FIELD, JR.,

Appellant.

*On Appeal from a Judgment of the United States District Court
for the Southern District of New York*

BRIEF FOR APPELLANT

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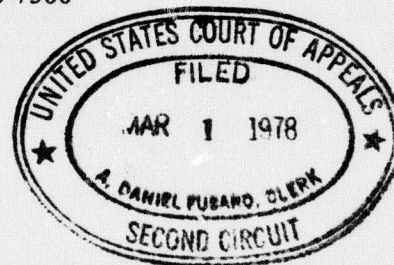


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1500

UNITED STATES OF AMERICA,

Appellee,

-against-

FRED R. FIELD, JR.,

Appellant.

On Appeal From the United States District Court
For the Southern District of New York

APPELLANT'S BRIEF

STATEMENT

The defendant-appellant, Fred R. Field, Jr., appeals from a judgment of conviction entered on December 2, 1977, after a trial before Hon. Morris E. Lasker, D.J., and a jury, in the United States District Court for the Southern District of New York. Appellant was convicted upon all counts of a ten count indictment growing out of charges that, during a six year period of time from 1968 to 1974, and while being a labor union official, he solicited and received unlawful payments from an employer.

Appellant was additionally charged with income tax violations for failing to report the proceeds of these activities. Thus, appellant was convicted upon one count of "Racketeering" activity

for having been engaged in a "pattern" of receiving payments from an employer (18 U.S.C., §§1961, 1962); four counts of accepting unlawful payments from an employer (29 U.S.C. §186[b]); conspiracy to violate both of the above-indicated statutes (18 U.S.C. §371) and, four "tax" counts for "attempting to evade" (26 U.S.C. §7201) and "false statements" in tax returns (26 U.S.C. §7206) relating to the tax years 1971 and 1974.

Appellant was sentenced concurrently on all counts to a term of thirty-six (36) months in the custody of the Attorney General, one (1) year of which is to be in actual confinement, and the balance being suspended in favor of probation. On each count, appellant received a cumulative, non-committed \$5000 fine (\$50,000 in fines, in total).

In sentencing, Judge Lasker took special note of appellant's extensive medical history and allowed appellant to remain on a personal recognizance bond pending appeal (283a).

INTRODUCTION

Appellant was the General Organizer of the International Longshoreman's Association (hereafter I.L.A.), a national labor organization headquartered in New York City with local affiliates in most ports along the Atlantic, Southern and Gulf coasts of the United States. Appellant held this position for in excess of twenty years, as well as other I.L.A. posts on a regional and

local level, including a position as President of the Banana Handlers Council of the I.L.A.--an organization concerned with working conditions relating to the unloading of banana boats at the aforesaid ports.

In December, 1976,¹ appellant was indicted upon various charges growing out of claimed "shakedowns" in 1968-9 and 1971, of a major importer of bananas--United Brands, Inc.² The thrust of the Government's case is that appellant threatened to cause disruption in the unloading of banana cargoes unless he was 'paid off'. According to the proofs, all of appellant's alleged extorsive dealings against United Brands were directed solely to the latter's labor relations house counsel--Beverly Hackmann. While Mr. Hackmann testified to delivering to appellant \$41,000 in 1968-9, \$48,500 in 1971, and \$35,000 in 1974, there was no eye-witness to the claimed extortion or to the alleged turn-overs of cash by Hackmann to appellant. Various company officers, apart from Hackmann, however, did testify to more or less contemporaneous claims made by Hackmann to them that money

1. In May 1977, a superseding indictment added new allegations relating to alleged payments in 1974 as well, two tax counts for evasion and two tax counts for tax fraud (26 U.S.C. §§7201, 7206). The tax counts relate to moneys allegedly received in 1971 and 1974.

2. United Brands Inc. and United Fruit Co. are parent and subsidiary respectively.

was needed to pacify appellant. These United Brands officials acted to provide to Hackmann the amounts which he reportedly needed to 'pay off' appellant. Various records preserved by United Brands documented travel by Hackmann between corporate offices in Boston and New York. Largely based upon the dates shown by certain of Hackmann's trips to New York City, he claimed meetings with appellant and the surrender to him of the amounts demanded to ensure uninterrupted banana shipments.

On this appeal substantial legal issues are preserved for review. Some of the questions, if resolved in appellant's favor, must vitiate the judgment of conviction in its entirety. Other points are addressed to specific counts, but some of these are of such importance as to be epidemic to all counts.

Our major contentions are as follows:

- "1. a. There was no proof of conspiracy. The defendant's alleged acts involved threats of such grave financial loss to United Brands that surrender to his extortion did not cast the corporate officers who acceded to his threats into the role of co-conspirators. If anything, these officers and the company were victims of the offense. The trial court erred in concluding that all corporate officers involved in providing funds to satisfy appellant were co-conspirators. This ruling opened the way to the admission of substantial hearsay of an untrustworthy nature since none of the United Brands officers could independently verify if Hackmann was either delivering the money

to appellant or pocketing it.

b. In addition, although reminded to do so by counsel, and although promising to do so, the court gave the jury absolutely no instructions on how to determine if the company officers were co-conspirators or victims.

c. Appellant acted for his own benefit and conspired with no one to effect the crime. Proof of conspiracy was, therefore, legally insufficient.

2. The trial court erred in its instructions to the jury, in answer to a question from one of the members of the panel. It was error in this case to instruct that proof of asking for a pay-off was enough to convict and that proof of receiving money was not essential. This was error because the government's case was actually tried on the theory of 'receiving' payments and was defended against on that premise.
3. The tax convictions under 26 U.S.C. §7206 for false filing were insufficient in law as there was no proof that appellant signed the returns or filed them in Southern District of New York.
4. The trial court erred in failing to instruct the jury to elect among various multiplicitous counts. The Taft-Hartley 'payoff' counts (Nos. 2, 3, 4, & 5) were already specifically embraced in the Racketeering Count (No. 1). Appellant was thus twice tried for the same payoffs. Moreover, the court imposed separate, or cumulative fines on all of these counts.
5. The tax counts were likewise multiplicitous. Appellant was convicted twice for 1971 violations and twice

for 1974 violations upon the theory that fraud (§7201) and false filing (§7206) were discrete crimes. Moreover, appellant was fined cumulatively on all four counts.

6. The trial court erred in sentencing defendant under the conspiracy count (No. 3) as a felon. Count 3 was a hybrid felony-conspiracy count because of the Taft-Hartley misdemeanor violations so that the three year sentence (which included two years of probation) and the \$5,000 fine were excessive as a matter of law.
7.
 - a. The Racketeering charge (Count 1) and its Conspiracy adjunct (Count 6) both depended upon proofs of criminal conduct predating the passage of 18 U.S.C. §§1961, 1962. The statute and the related proofs are, therefor ex post facto deficient.
 - b. Moreover, proof of payments in 1968-69 was offensive to the statute of limitations as appellant was indicted in December, 1976.
 - c. The trial court's instructions that a conspiracy to violate the Racketeering Act (which act did not come into being until October 1970) began in 1968 was clearly erroneous. The fact that pre-1970 payments could be considered on the substantive Racketeering count (No. 1), did not supply a basis for allowing the jury to find a Racketeering 'conspiracy' beginning in 1968.
8. Counsel for the government's summation was inflammatory and prejudicial."

THE EVIDENCEa. The Government's Case³

BEVERLY HACKMANN testified that, for many years, he was Director of Labor Relations for the United Brands Company whose primary business is the sale of bananas (74-7). United Brands imports the bananas on its own ships which are discharged by longshoremen of the I.L.A. (International Longshoremen's Association) at United States ports (78-9).

In connection with his work, Hackmann stated that he knew appellant for a long time as an official of the I.L.A.; that is, as an officer of Local 856 in Manhattan which handled United Brands produce; as the General Organizer of the I.L.A.; as President of the Banana Handlers Council of the I.L.A., and as a member of the I.L.A.'s Atlantic Coast District Council (80-2).

Hackmann testified that in years gone by there had been strikes by the I.L.A. of Atlantic and Gulf Coast ports but that, despite these strikes, it was always possible to discharge banana cargo at a number of the Southern and Gulf Coast ports (83-4). During the strikes, however, North Atlantic ports did not operate to discharge banana cargo (83-4). Accordingly, it was customary for

3. References are to the typewritten pages of the original record except where the signal "a" is used to refer to pages of appellant's appendix.

the bananas normally unloaded along the North Atlantic to be diverted and unloaded by I.L.A. longshoremen in the Southern and Gulf Coast ports (84-5).

REGARDING THE 1968 I.L.A. STRIKE
AND ALLEGED PAYOFFS

In September 1968, the I.L.A. was negotiating with the New York Shipping Association against a September 30th strike deadline (85)⁴. A strike was called by the I.L.A., but an 80 day Taft-Hartley injunction soon issued (85-7). In early December, 1968, prior to the expiration of the 80-day injunction, or perhaps in August, 1968, appellant telephoned Hackmann at his office and told him he wanted to see him (88-90). A meeting was arranged, at which time defendant told Hackmann that, while in the past United Brands had been allowed to discharge bananas at South Atlantic and Gulf Coast ports during a strike, the "free ride" taken by United Brands in previous strikes was over--unless defendant was given \$500. cash for each banana ship to be unloaded during the strike (89-90).

Hackmann stated that he told appellant he would have to "report his demand to our people [Hackmann's "boss" - Wilbur Lauer]" in Boston (90). Lauer was a Vice President of United Brands (91). Hackmann told Lauer about the "demand", and also probably told him that appellant "could in fact stop our operation if we didn't pay

4. A contract agreement between the I.L.A. and the New York Shipping Association would, for all practical purposes, be followed by I.L.A. locals in all other ports on the Atlantic and Gulf Coasts (244-5).

him" (92). Thereafter, Lauer met again with Hackmann and told him "the company had decided to go along with Mr. Field's demand and pay him the money, if there was in fact a strike" (92). Hackmann told Lauer that if the money was not paid, he did not think that bananas could be unloaded (93-4). According to Hackmann, his "boss" Lauer "was very familiar with the I.L.A." (93). Hackmann also stated he knew "how the waterfront works" and that local I.L.A. officials "did what [Field] told them to do" (95). Accordingly, he telephoned defendant and told him that United Brands would "go along with his demands" (95).

The strike began on December 21, 1968, but the Southern and Gulf Coast ports --as always-- unloaded the bananas that were barred from the North Atlantic (96). During the strike, Hackmann allegedly paid over to defendant \$41,000 in cash in seven payments (96-7). He would get the cash from the Vice President of Finance, Edward Gibbons, in Boston, and deliver it to defendant in an envelope (97). Never was anyone present at a cash delivery except the defendant and himself (98). One payment was made in defendant's automobile at LaGuardia Airport (103). Another was made in the lobby of defendant's apartment house building on East 56th Street, and others were made in defendant's apartment upstairs or in Field's office (104-5).

The 1968 strike was finally settled with a three year contract (106).

REGARDING THE 1971 STRIKE
AND ALLEGED PAYOFFS

The contract with the I.L.A. expired on October 1, 1971, but before this occurred, defendant telephoned Hackmann for a meeting which they had at the Royal Manhattan Hotel (107). Defendant told him negotiations for a contract renewal were going badly; a strike was imminent; and that he wanted money if United Brands intended to unload bananas in the South (113-4). Hackmann, subject to approval from his Boston superiors, bargained defendant down to \$500. per vessel, except for those unloaded at New Orleans where a price of \$1,000. per ship was to apply (114-5). Hackmann reported the incident to Lauer who thereafter indicated to him that "the company would go along with Mr. Field's demand" (118-9).

The 1971 longshoreman's strike began on October 1, and lasted for about seven weeks (119-20). During this time, United Brands' bananas were unloaded in the South (120).

Hackmann gave the defendant \$48,500. in cash in six or seven payments during the Fall of 1971 (121). The payments were made to defendant in New York at 7 to 10 day intervals (123). In each instance, he would acquire the necessary cash from Mr. Gibbons, United Brands' Vice President of Finance (123-4). His records revealed trips to New York from Boston on October 8, 15, 22 and 28 — and he believed that on each of these occasions he made a payment to defendant (157). On November 8, November 28, and

December 13, 1971, he made trips to New York during which he gave money to defendant (161-2, 171). On the November 28th trip, some of the money to be delivered to defendant was stolen from his hotel room and he, therefore, paid to the defendant only the portion left behind by the thief (167-8).

He reported the stolen money episode to Mr. Lauer and Lauer told him he need neither resign nor repay the money out of his own pocket--but that Hackmann should see Mr. Gibbons, the Vice President of Finance (170-1).

REGARDING THE ALLEGED 1974 PAYMENTS
FOR "LABOR PEACE".

The 1971 contract was due to expire on September 30, 1974, but a new agreement was arrived at before then (172). The defendant invited Hackmann to a meeting at a restaurant where he advised that he wanted \$35,000 for "labor peace" for the next three years (174-5). He understood this to mean that there would be no wildcat strikes or work stoppages or slowdowns (176). They also discussed a thirty day extension of certain contracts which United Brands wanted because of a recent hurricane (174-5, 17179). That extension was granted (180).

When Hackmann got back to Boston, he discussed the matter separately with Donald Meltzer, his new superior who was Vice President of Finance and Administration, and with John Taylor, the President (180-1). Later on, Meltzer told him the payment was authorized by "the company" (183). A tie-up of even a single ship with the loss of cargo through rotting could cost the Company over \$300,000 (178-9). Hackmann notified the defendant of this approval and made three trips to New York to pay out the \$35,000 (184-7, Exhibits H, I, J.). The payments were made at defendant's apartment building--in the elevator, the lobby, and the defendant's apartment itself (189-92; Exhibit 1L). At none of the alleged payments was anyone else present except

Hackmann and the defendant (193).

In August 1975, he received a telephone call from defendant (194). At about that time, the instant case was being investigated by the United States Attorney for the Southern District (194). The defendant told him that "our [United Brands] finance man was talking" (195). Hackmann countered that all of his own activities were under investigation. The defendant told him "Remember Chink; don't forget"; "Remember Chink, you know what I mean" (195, 492, Exhibit B).

"Chink" was the nickname of Clarence Henry who was the deceased leader of an I.L.A. 'black' local in New Orleans (196). At the time of the telephone call, Henry was already dead (196). Hackmann took defendant's words about "Chink" to mean that, if he was obliged to explain what he had done with some money, that he should say he "gave it to Mr. Henry" (197; Exhibit K).

On cross-examination, Hackmann acknowledged that in every strike in the last 30 years, bananas and perishables would always be unloaded in Southern ports (249, 253-4, 257, 263). This was a historical fact known to everyone in the industry (264). Never prior to September 1968, had the defendant asked him for money (274).

Hackmann had no written records of making any of the payments testified to, but by reviewing his travel vouchers he

could reconstruct the payments by connecting them to specific trips shown by the records (313-4, 457-8). Insofar as the people above him at United Brands were concerned, they never asked him for any proof that he had actually given money to defendant (342).

As far as how much money he gave to defendant on any particular date was concerned, he had no record of this and was not sure of any of the amounts (460-1, 547). Nor was he sure that on any particular date he did give any money to the defendant (461-2).

THE TESTIMONY OF THE ALLEGED CO-CONSPIRATORS--THE
EXECUTIVES OF UNITED BRANDS WHO PROVIDED FUNDS FOR
THE PAYOFF

The efforts of Hackmann to procure funds from United Brands' coffers in order to pay defendant came into the case in the form of testimony from alleged co-conspirators employed by the Company. (The court's easy characterization of the United Brands executives as co-conspirators, and not victims, because they marshalled the funds to pay defendant at the alternative peril of great losses to the Company, is a major issue on this appeal [549-51]). (See infra, Point 1).

WILBUR LAUER testified that he was employed by United Brands from 1962 to 1972 (65a). He was a Senior Vice President (582-3). In 1971, his subordinate, Beverly Hackmann-- who was Director of Industrial Relations-- told him that the defendant had called and wanted to see Hackmann "about making arrangements to discharge fruit" (554). Hackmann met with the defendant and reported later to Lauer that defendant "demanded a large lump sum payment for movement of the fruit, discharge of the fruit during the strike" (555). Hackmann told Lauer he rejected defendant's demand for a lump sum, but did agree to a price of \$500. "per boat" which was unloaded of bananas (556). Lauer said he agreed that the demand for cash should be paid to defendant (556).

In November of 1971, Hackmann told him he was to attend a business dinner in New York and would make a payoff to the union or defendant at the time (557). The Company had a table at this

dinner and, a week or so later, Hackmann reported to him that the money he was supposed to pay over to defendant had been lost or stolen (558). Hackmann was agitated and reconstructed the events leading up to the loss (559). Lauer told him not to worry; he was on "company" business and the company would replace the lost funds (559). He told Hackmann to see Mr. Gibbons (the Vice President in charge of Finance) to get some more money (559, 587).

Insofar as the 1968 strike was concerned, Hackmann spoke to him at that time about making payments to get ships unloaded during the strike (560). Hackmann advised him that in order to unload bananas in Southern ports during the 1968 strike, money would have to be paid (562).

On cross-examination, Lauer acknowledged that bananas, and other perishables, had always been unloaded in Southern ports during times of general cargo strikes (602-3). He also knew that the Southern ports were in "Right-to-Work" states (603-4).

CHARLES McCAULEY testified that he worked for United Fruit Company (United Brands) until July, 1972, as Vice President of Transportation and Shipbuilding (81a). Part of his responsibilities from 1968 to 1971 related to terminal operations for discharging bananas in the United States (82a). In the Fall of 1968, Beverly Hackmann told him that, in the event of an I.L.A. strike, they were not going to be able to unload bananas unless a certain amount

of money per vessel to be unloaded was paid to defendant (85a-7a). Later, Hackmann told him he had "settled up" with Field (86a).

In 1971, prior to the commencement of the next strike, Hackmann told him that he had spoken to defendant and had worked out a more costly arrangement to unload banana ships (87a).

On cross-examination, McCauley conceded that bananas were always unloaded in Southern ports during strikes (90a).

EDWARD F. GIBBONS testified that in 1968 he was the Controller of the United Fruit subsidiary of United Brands (666-7). Vice President Lauer told him in the Fall of 1968 that he was to deliver money to the Director of Labor Relations, Hackmann, from time to time (667-8). From December of 1968 to February of 1969, on about a half dozen occasions, he delivered in excess of \$30,000 to Hackmann (668). The money was in \$50. bills (668).

In 1971, there was an I.L.A. strike and Hackmann said he needed a large amount of money (669). He delivered cash to Hackmann on a half dozen occasions (670). He gave \$55,000 to Hackmann (673).

When he was first directed to give cash to Hackmann by Lauer, he knew enough to mind his own business (678-9). He did not ask what the money was for (678). The money came up as cash from Panama (680-1, 704-5).

PATRICK BRANGWYNNE testified that in October, 1971 he was

treasurer of the United Fruit Division of United Brands (714). Edward Gibbons, United Fruit's Vice President of Finance told him to increase the petty cash on hand in order for him to make certain cash payments (715). This he did by drawing company checks for the petty cash fund on October 8, 1971 (Exhibit 5A), October 14, 1971 (\$3,500), October 22, 1971, (\$6,000), November 5, 1971 (\$7,000), November 23, 1971 (\$2,500), November 25, 1971 (\$13,500), December 8, 1971 (\$15,500) [715 et seq.]. The cash was in \$100 bills (715, 726). On two occasions, October 8, and the day after Thanksgiving in 1971, he recalled turning cash over to Mr. Gibbons (725). On December 28, 1971, Mr. Gibbons returned \$57,500 in cash to him.

In November, 1974, Donald Meltzer, the Vice President of Finance for United Brands, requested him to return \$10,000 in cash which had been previously lodged with him (732).

DONALD MELTZER testified that in the Fall of 1974 he was Vice President of Administration and Finance for United Brands (768). He maintained a cash fund for the Company in a safe deposit box in his own name (768, 773). In late 1974, Beverly Hackmann told him he needed cash \$35,000 to \$45,000 to "guarantee several years of labor peace" (769-70). Hackmann mentioned the name "Freddy" (771). But he did not say who was going to get the money (798). Meltzer advised Hackmann to discuss the matter with John Taylor, the President (769-70).

Two or three days later, he, Hackmann and Taylor met (772). Taylor told Meltzer that Hackmann had told him about the need for cash (772). Taylor directed Meltzer to give Hackmann money (772).

A bank record of visits to Meltzer's vault showed access on October 7, 1974 (775). At that time, he removed \$10,000. and gave it to Hackmann (776). On October 21, 1974, he gave Hackmann another \$10,000. from his safe deposit box (778). On November 21, 1974, he gave Hackmann another \$15,000. from the vault (778-9).

On cross-examination, Meltzer stated that his predecessor, Mr. Gibbons, also had a vault in his own name for cash purposes (784-5). Gibbons had told him that, from time to time, company people would approach him for cash (786).

JOHN TAYLOR testified that in 1974 he was President of United Fruit Company (839). In the Fall of 1974, Beverly Hackmann told him that the Company could "look forward" to peace for the discharge of its ships if it paid \$35,000. to "Freddy" Field (840). Hackmann told him that, if the money was not paid, it "could lead to a good deal of trouble" (841). Later on, he gave his approval to making the payments to Mr. Meltzer, the company finance man (842).

PROOFS REGARDING THE TAX COUNTS

RITA MURRAY an I.R.S. accounting technician, identified the defendant's joint tax returns for 1971 and 1974 (850-1). The 1974 return was handled at Brookhaven, L.I. (854). It was a return belonging to District 13 which covers New York City and Westchester and the headquarters for which were located in New York County (854; Exhibits 8A and 8B).

The 1971 return was addressed to the Andover, Massachusetts Service Center (857-8). The 1971 return was mailed from Florida to Andover, Massachusetts (858-9). The only reason that the 1971 return was allocated to District 13, is that the home address of the taxpayer on the return itself showed defendant's address in Manhattan (859). The returns are not stamped by the I.R.S. to show where they were mailed from (862). The envelope of the sender would show where it was mailed from--in this case, Florida (859, 866).

With respect to the 1974 return, the returns for that year went to Brookhaven Service Center at Holtsville, Long Island (863). As to this return, she could not tell where it was mailed from (863). Nor is there any indication that the 1974 return was physically in New York City at any time (867, 869).

A tax return is listed as filed in accordance with the address of the filer, although the return may not be physically received in that

district (870-1). The returns are worked on, or processed, at the service center and not in New York City (871-2).

JUSTIN RHODES testified that he was the accountant who prepared appellant's tax returns for the years 1971 and 1974 (880 et seq.). For these years, appellant turned over to Rhodes his cancelled checks and other tax data (882). If necessary, he conferred with appellant by telephone respecting certain items, and then drew up tentative returns at his Manhattan office which appellant would review there with him (882-3). Subsequently a final return would be typed up, signed by Rhodes as the preparer, and delivered to appellant by mail for execution by him, his wife, and for filing by mail (883-4, 894-5).

On cross-examination, Rhodes stated that he knew that appellant resided in Florida in 1971 and 1974 and he would sometimes try to telephone appellant there (895-6). He had appellant's Florida mailing address (897). As to where his office actually mailed returns for execution to appellant--either Manhattan or Florida--he did not know, as he did not prepare the envelopes for mailing (897). And, neither appellant nor his wife, ever executed the returns in Rhodes' New York office (897). As to where the returns were actually signed by appellant and his wife, he had no knowledge (898). Nor did he know where the returns were mailed from (898).

THE DEFENSE CASE

Appellant's defense consisted mainly of several union officials from various Southern and Gulf Coast I.L.A. locals or District level organizations, who testified concerning the history of discharging perishable cargo during general strikes of the I.L.A. These witnesses confirmed the fact that, in every strike within recall, the I.L.A. policy in the Southern and Gulf Coast ports was to discharge perishable cargoes, including bananas. Several reasons were given for adherence to this policy of continuing to "work perishables" notwithstanding the fact that all ports were otherwise deliberately tied up. It was pointed out, for example, that the I.L.A. did not want unfavorable publicity for causing cargoes to rot. Additionally, it was observed that the states where perishables were unloaded were, by and large, "Right to Work" states where non-union labor could, and would, unload perishables if called upon to do so. Since perishables would be discharged in any event, it was better to allow union labor to keep on working with this type of cargo. Otherwise the rank and file would lose earnings. Moreover, at the conclusion of the strike, labor would be paid retroactive increases.

It was likewise emphasized that the local unions were weakest in the Southern ports and could not afford to fight

against injunctions or to pay fines for violations of easily procured court orders directing the continuance of work.

Another vital reason was that the perishable cargoes constituted only the smallest portion of shipping which would normally be struck against. Therefore, the unloading of this type of cargo did not interfere with the overall effectiveness of a general cargo strike, or otherwise delay the resolution of that strike. Also, the policy in favor of unloading perishables was so well established that rank and file workers, interested in gaining income from any source during a strike, were anxious to unload bananas and would not follow anyone's direction to strike perishables.

The witnesses called made it plain that local autonomy in the I.L.A. was strong (1025). Appellant, therefore, could not direct a strike against perishables even he had wanted to. The rank and file would simply not give up earnings to be derived from working perishables. Moreover, witnesses asserted that they would very likely lose their positions as officials in the so-called Southern bananas locals if they dared to press the workers to give up the opportunity to unload perishables.

It was also established that the unloading of bananas is not a complex operation requiring sophisticated heavy equipment. Therefore, it would be a simple matter for a struck

ship to move out of any port and to move up the Gulf Coast to almost any other harbor and thereby discharge perishable cargo with the help of non-union labor. The local unions in most ports were unwilling to carry out strikes against bananas because of the ease with which the unloading operation could be shifted to adjacent ports.

None of the witnesses took orders from appellant and none would have acceded to any secret or open direction from him to engage in a strike against bananas (Raspberry 918-32; 946-50; Evans 958-65; Clemons 994-1005, 1045-6; 1063-4; Billups 1072-7; Wilson 1082-8).

POINT 1

THE COURT'S RULINGS AND JURY INSTRUCTIONS WERE ERRONEOUS FOR FAILING TO EXPLAIN TO THE JURY HOW, IF AT ALL, THE THREATS AND EXTORTIONATE ACTIVITIES OF APPELLANT AGAINST HIS VICTIMS BORE UPON THE FACTUAL ISSUE OF THEIR BEING HIS ACCOMPLICES AND CO-CONSPIRATORS. IN THIS CASE, MOREOVER, THE GOVERNMENTS' WITNESSES WERE NOT CO-CONSPIRATORS AS A MATTER OF LAW.

The evidence, if believed, established that appellant--acting entirely on his own--exacted large cash payments from United Brands in 1968, 1969, 1971 and 1974 as the price for labor peace with his union (the I.L.A.) and to avoid threatened interference by appellant with the orderly discharge of banana cargoes. A key employee of United Brands acted as the conduit of appellant's threats to officials of the company who, fearing huge cargo losses from wildcat strikes and walkouts which could likely be instigated by appellant, acceded to appellant's alleged demands. For this conduct, appellant was described by the prosecutor as a modern-day pirate and a "hold-up" man who: (25a)

"conveyed a threat of economic damage [to United Brands] so vast that this company could not take the risk of saying no."(Emphasis added)

Fearing that its huge banana import operations were hostage to appellant, United Brands, in order to continue its normal and traditional operations, paid to appellant what he demanded. The company's submission to economic rape--and not to gain special

favours -- did not cast it into the role of co-conspirator, any more than the payments of a ransom to a kidnapper, or to airplane hijacker render the victim, family, or the airline, accomplices in the underlying crime. This, the court refused to acknowledge and never gave instructions to the jury on the subject despite defense counsel's repeating flagging of the issue.

In this case, the issue of alleged conspiratorial status was raised at the beginning of the trial by counsel to a court which repeatedly either ignored the issue or promised later instructions which were, however, never given. The trial court's avoidance of the central issue of criminal complicity by United Brands and its employees left the way open to the admission of substantial unreliable damaging hearsay from the putative "executive" co-conspirators, and gave the Government the added advantage of having its witnesses appear as confessed miscreants whose admitted implication in "the conspiracy" bolstered the very charge of a conspiracy. Moreover, the failure to instruct the jury on the issue of whether the United Brands executives were victims rather than accomplices, or even what the hallmarks of conspiratorial conduct are, took away from the jury the entire issue of whether appellant was guilty of conspiring with others.

The problem having been stated, we point now to the record

for details showing the emergence of this issue. Even prior to opening statements, appellant's counsel objected to any opening statements which would refer to the United Brands executives as co-conspirators (24a). Appellant's counsel vainly raised this as a "threshold legal point" involving the distinction between "victims" and "co-conspirators" (24a-25a). The court declined to give any instructions on the issue then, but promised to deal later with the problem (25a).^{*} The Government's opening, referring to "piracy", "hold-ups", and "vast" "economic damage" by appellant, then ensued (26a,27a), thus clearly posing the image of total victimization of United Brands by appellant's threats to interfere with normal and routine operations.

Subsequently, the Government called Beverly Hackmann as a witness. Hackmann was United Brands' labor counsel who testified to the only direct extortionate dealings with appellant that were adduced during the entire trial. When Hackmann proceeded to testify to conversations he had with a superior (Will Lauer) about appellant, and what this executive stated to him, objection was raised to hearsay; and the point was vainly pressed that an extortion victim is not automatically an accomplice or co-conspirator (27a-1,2). The Court fobbed off the objection, and gave the jury absolutely no guidance on the question of accompliceship except to say that: (27a-3)

^{*} The trial court sought to assuage defense counsel by stating, that, later on "I will say they have to find that they are co-conspirators and not victims" (25a). The court never honored this promise.

"...you later will have to decide whether you believe Mr. Lauer was a co-conspirator or not and whether or not his statements are binding on Mr. Field" (emphasis added).

Thus, the trial court allowed into evidence Hackmann's testimony of what Lauer and other company people had told him about the payoffs-- but in so doing, the court did not supply any guide whatsoever to the jury on the issue of how to determine what a conspiracy is, how membership in a conspiracy is to be determined, or how the concept of being a victim interfaces with the conspiracy issue in this case.

The same problem, with accompanying objections, surfaced later on with respect to Hackmann's alleged conversation with Lauer about pay-off monies being stolen from Hackmann by a burglar prior to one meeting with appellant (28a-30a); and Hackmann's conversation with Donald Meltzer, a vice-president of finance regarding alleged money demands by appellant in 1974 (31a-34a).

Counsel for defendant posted a continuing objection to Hackmann's assertions of what his superiors said to him in conferences relating to the extortion, and counsel made the same objection as to all other company witnesses who would be reporting on the same subject matter (62a et seq.). Thus, counsel for appellant again requested the court to point up that hearsay statements of a "victim" of an extortion to Hackmann would be inadmissible and that the later testimony of such persons should not be received as testimony of a co-conspirator (62a et seq.). The court advised counsel not to repeatedly renew his objections on this subject (62a); and specifically refused to instruct the jury on the issue posed (is a "victim" a co-conspirator?) (62a-64a). Then, the court mistakenly stated that the jury had been instructed on the subject the day before (64a). No such instruction had ever been given (27a-2, 27a-3). All that the court did say a day earlier was that the "law permits statements of somebody who is a co-conspirator with the defendant to be put into evidence through a third person ..." (27a-3). Absolutely no effort was made at that time, or any time, to explain the law of conspiracy or how to identify a co-conspirator, or what the facts relating to "victimization" have to do with conspiratorial status of the "victim".

Against this background, there was admitted into evidence

the testimony of all other alleged co-conspirators who held positions with United Brands (McCauley 81a-90a; Gibbon 91a-97a Brangwynne 98a-114a; Meltzer 115a-133a; Taylor 134a-137a). Each was introduced to the jury as a co-conspirator and each testified amply with hearsay about conversations had with other alleged co-conspirators in the United Brands Company.

At the conclusion of the Government's case, defense counsel invoking Rule 29, vainly pointed out that no conspiracy could exist between the defendant and his victims (143a-148a). Thus he stated (147a-148a):

"MR. FEITELL: There is wholly insufficient testimony to indicate that defendant was involved in a conspiracy with anybody to do anything... I urge again that Hackmann, that various employees of the company that testified here, were not co-conspirators with him; that by no stretch of the imagination did they plan and plot this. Apparently, according to their proof, the author of this was Mr. Field. They are the alleged victims. Who did Mr. Field conspire with, with his victims? That's sheer nonsense. ... the venture is Fred Field's collecting moneys from that company. Their interest in have a continuation with shipping is not a part of the venture or stake in the venture...."

Again, at the end of the entire case, appellants prior motions were renewed--and, again denied (232a-233a). And with respect to the requests to charge, defendant pointedly

insisted that the government's proposed charge No. 17-B improperly cast the United Brands witnesses, en masse, into the role of co-conspirators (153a-4a). Defense counsel thus vainly argued: (154a)

"MR. FEITELL: I am continuing my objection which I raised a long-time ago that they are victims, if anything".

Against this background, the court delivered a "boiler-plate" conspiracy charge without in any way touching upon the issue of whether victims of an extortion (such as United Brands and its executives) could, nor should, be considered co-conspirators (210a-19a). Nor did the court explain how a finding of non-conspiratorial status as to any, or all, of the Company witnesses would affect the admissability or use by the jury of their hearsay testimony.

The court's threshold finding of a conspiracy was erroneous. (27a1-3). The proofs before the court, the government's opening remarks, and its summation, all depicted the threat of extreme financial damage if appellant's demands were not met. The prosecution called the crime "a shakedown" (161a); "extorted by this man, Fred Field (161a); "what Mr. Field got was protection money" (162a); and, "if that money wasn't paid, ships would not unload" (166a) .

In its opening, the Government characterized the case as one involving "piracy" (25a), and in its closing actually agreed with the defense position on the issue of victimization. Thus, the prosecutor summed up, in part, as follows: (176a)

"We all know from the proof in this case that this couldn't be a bribery case. This has to be an extortion case.

"In an extortion case...who is the villain, the guy who is being forced to pay out or this oak, I think he was called, who is putting the arm on him for money" (emphasis added).

The court erred in deciding, as a matter of law, that the United Brands company and its officers conspired with the defendant. Indeed, the proof on the subject of economic duress was so clear, and the alternative of vast injury to United Brands so persuasive, that the court's wholly unexplained conclusion of conspiratorial activity defies reason. Even if the issue was one of fact, no guidelines at all were posted on this issue to the jury. No instruction was given that the coercion involved, if of a sufficient quantum, could preclude the theory of active complicity in either the charges of Conspiracy, Racketeering or the making of unlawful payments to a labor representative.

To have been co-conspirators with defendant, the United Brands officials would certainly have had to be aiders and abettors,

or principals in the commission of the crimes charged (18 U.S.C. §2). While conspiracy may be a broader crime, it necessarily involves the elements of aiding and abetting (United States v. Peterson, [C.A. Va. 1975] 524 F.2d 167). Thus, the United Brands executives, in order to have been aiders and abettors, would have had to associate themselves with defendant's venture, and participate "in it as something that [they] wishe[d] to bring about,"; that is, by their "action to make it succeed" (Nye v. Nissen v. United States, 1949, 336 U.S. 613, 619; quoting from United States v. Peoni, 2 Cir. 1938, 100 F.2d 401, 402; United States v. Manna, 2 Cir. 1965, 353 F.2d 191, 192, cert. den., 384 U.S. 975, reh. den., 385 U.S. 893, United States v. Licursi, 2 Cir. 1975, 525 F.2d 1164, 1167; emphasis added). Moreover, criminal intent to commit the crimes charged "must exist in the minds of both the principal and the aider and abettor" [United States v. Penn [2 Cir. 1942] 131 F.2d 1021; United States v. DeLaMotte [2 Cir. 1970] 434 F.2d 289, 293]).

There is certainly no basis, upon the facts established in this case, to assume that United Brands, or its officers, "wished to bring about" their own extortion, or that they wished to help the defendant "succeed" in rendering their own company prey to defendant's financial lust. Nor can it be seriously contended that those officials of United Brands shared, "in their minds"

with the defendant the "criminal intent" which propelled the defendant forward in reducing United Brands to his vassalage. It was allegedly the defendant who came to United Brands (through its labor counsel) and voiced the fiat of tribute. The company did not approach defendant for any purpose shown in the record-- nor was it claimed that the company promoted or precipitated, the payments by its own prior activities. The company officials thus submitted to defendant's threats by recognizing or believing, that defendant had it within his power to stop the importation of bananas ready for marketing and thus to cause extensive and irreparable economic harm to them. Only by acceding to defendant's demands could the company continue, as it has during every single prior strike, to discharge bananas in Southern ports where I.L.A. workers traditionally gave free-passage to perishables. The act of paying over moneys to defendant upon penalty of vast economic loss, if not other varieties of waterfront terrorism, did not make the reluctant and fearful acquiescence to defendant's demands a "willful" act on the part of his victims [29 U.S.C. §186[d]; United States v. Motzell, 190 F. Supp. 192]. The "purpose" of the company officials in surrendering to the will of defendant was thus, to avoid economic losses of severe magnitude; while the defendant's purpose--as noted by the

prosecutor--was "greed", or his own personal gain. Thus, the United Brands executives did not "share the criminal intent or purpose of the principal" (United States v. Varelli [7 Cir. 1969] 407 F.2d 735, 749 emphasis added; Morei v. United States [6 Cir. 1942] 127 F.2d 827, 831; United States v. Rosenblatt [2 Cir. 1977] 554 F.2d 36). Nor did they act "willfully" in making such payments as is the requirement of §186 [subd. d] before the giving of a payment can be viewed as criminal. Accordingly, it was clearly erroneous for the trial court to rule, at the threshold, that the United Brands employees were co-conspirators of the defendant (see United States v. Holder, [8 Cir. 1977] 560 F.2d 953, 957).

The factor of coercion--while explaining the fearful state of mind of defendant's victims, and being arguably relevant on the issue of Racketeering--should actually have precluded any assumption by the court of the existence of a conspiracy. Coercion, threats, pressure, and fear were the amalgam of defendant's alleged crime. The Government itself made the defendant's coercive threats the lynch-pin of its prosecution. Because defense counsel repeatedly urged the point that coercion precluded conspiracy, and brought also to bear the special

considerations relating to the non-admission of suspect hearsay⁵, the trial court should certainly, on the record developed, have found that the Government's "company" witnesses were not co-conspirators. (Hutson v. United States, [9 Cir. 1956] 238 F. 2d 167, 171). Alternatively, the trial court should have explained to the jury that, if the ability of United Brands to resist defendant was so substantially impaired that payments to defendant were unavoidable, the witnesses were not to be considered co-conspirators (see United States v. Kahn, [2 Cir. 1973] 472 F.2d 272, 278-9; United States v. Barash [2 Cir. 1966] 365 F.2d 395 [Barash I]). This, however, the court failed completely to do--thus elevating to the level of binding admissibility each and every offending hearsay statement recounted by these witnesses. This constituted substantial and plain error on the part of the trial court.

Moreover, it should be remembered that, if the United Brands witnesses were not co-conspirators with the defendant, there was no conspiracy whatsoever (see United States v.

⁵Hackmann's claim to superiors that defendant wanted money were not inherently reliable and there is ample reason to consider whether Hackmann pocketed the funds he procured from United Brands. His alleged payments to defendant were not verified in any way.

Rosenblatt, [2 Cir. 1977] 554 F.2d 36, 38-9; United States v. Holder [8 Cir. 1977] 560 F.2d 953; Brown v. United States, 367 F.2d 145 cert. den. 387 U.S. 947).

POINT II

THE COURT ERRED IN GIVING SPECIAL INSTRUCTIONS, AFTER THE CASE HAD GONE TO THE JURY, THAT PROOF OF DEMAND FOR MONEY ALONE WAS ENOUGH TO WARRANT A CONVICTION. THIS INSTRUCTION WAS PREJUDICIAL BECAUSE IT SIGNIFICANTLY ALTERED THE THEORY ON WHICH THE CASE WAS TRIED AND INJECTED NEW ISSUES INTO THE CASE WHILE IT WAS UNDER DELIBERATION AND AFTER THE DEFENSE HAD SUMMED UP.

The Government's case was presented to the jury on the explicit premise that defendant both asked for and received payments from United Brands as a condition for labor tranquility. The indictment, in its first six counts, specifically recited that the defendant asked for, and did receive payments in violation of 29 U.S.C. §186, and went so far as to set forth seventeen separate instances of illegal payments. The indictment, likewise, contained four additional income tax counts, the clear purport of which was that the defendant received illicit payments which he failed to disclose in his tax returns for 1971 and 1974. Finally, the Government, in its opening and closing statements, and in its requests to charge placed the

case squarely on the premise that defendant not only asked for money from United Brands, but got it on each and every occasion cited in the indictment and in its proofs.

Against this background, the defense took the position in its opening, its cross-examination of the key witness Hackmann, in its own case, and in the closing statement for the defense that defendant had neither asked for, nor received a cent.

The factual issue thus presented to the jury at every turn of the proceedings, was whether the defendant had both asked for and received moneys to which he had no entitlement. Even the court's main charge on the subject (198a et seq.) seemed to take the position that an actual payment was a necessary element of the crime. For example, the court instructed (at pp. 198a-9a):

"Among the kinds of unlawful conduct Congress found susceptible to racketeering activity was the demand and receipt of money by labor union officials"
(Emphasis added).

At p. 199a the court said that the jury had to find "two of the payments referred to in Count 1". Of course, that count dealt only with completed payments--as, indeed, all other counts did. On p. 200a, the court stated: "Third, that the payments were connected with each other by some common scheme ...", and "Fourth, that the payments arose in the course of Field's employment"(200a),

The record shows numerous other indications that the jury was being led by both court and counsel to believe the actual payments were a sine qua non of criminal complicity (202a, 203a, 207a-8a).

It is in this setting, that the jury during its deliberations sent out a note (Court Exh. 3) asking whether the defendant could be found guilty if he had "not received" payments but had only "demanded" to be paid (259a-60a). Elsewhere in the note, a juror pointed out that the indictment "reads demand, received and accept payments" (260a).

Over defendant's objection the court instructed that, while the Government's theory of the case was in the conjunctive, the law required merely proof of a demand (261a-275a).

The court additionally, went out of its way to praise the jury for raising the issue, assigning thereby to the question posed its special approval in recognizing a unique and crucial point (274a-5a). One hour later, the jury came back with a verdict against defendant on all counts (275a et seq.).

The trial court's instructions were both erroneous and confusing and the court's special praise to the jury intensified the error. While 29 U.S.C. §186 is written in the disjunctive (to demand, or to receive) the indictment was parsed in the conjunctive. The case was also tried by both sides on that explicit premise. And, the court gave several instructions

adopting the conjunctive view. In this situation, the government's own pleadings and evidence mandated a broader parameter to be encircled by the proofs; that is to both demand money and to receive a payment. The cases allowing proof in the disjunctive, therefore, should not apply where the case is prosecuted by the Government on its own tailor-made theory and where opposing counsel is invited to defend, and does defend, against the broader panoply of proofs. (See United States v. Cioffi [2 Cir. 1973] 487 F.2d 492).

Nor is it academic that the court allowed a conviction to rest on a mere demand for money--without an ensuing payment--simply because the jury convicted on the tax counts which seemed to require the fact of payment. The tax counts dealt only with 1971 and 1974, and each tax count incorporated several claimed instances of payment. The jury's verdict on the tax counts did not, therefore, require a finding of payments in every instance embraced in each tax count. Counsel specifically requested a special verdict on each claimed instance of payment (151a-2a). This, the Court rejected (152a). It is impossible, therefore, to determine at this point exactly which 1971 and 1974 payments were found by the jury. The proofs should not be taken most favorably to the Government on this subject where defense counsel did, as here, take care to request a special verdict. The tax counts verdict, therefore, does not render academic the issue posed by this Point with respect to any of the other counts

of the indictment. As to each of these, the jury was invited to find guilt even in the absence of defendant's receiving any monies.

As previously stated, it was error to allow a verdict on the theory of a naked demand for money by defendant, because the case was tried on a "conjunctive" indictment and proofs geared into a "conjunctive" theory. But more importantly, the Racketeering count conviction (Count 1) would be an anomaly if it could be sustained simply on the money demand theory. Firstly, one can hardly visualize a racketeering scheme where the perpetrator, although allegedly engaged in a "pattern" of asking for money, is never paid a cent. The inefficacy of the demands alone would contradict the supposition of a pattern of Racketeering. Moreover, 18 U.S.C. §§1961 and 1962 clearly assume that the pattern of behavior should include the actual gaining of funds somewhere along the line. This is made apparent even by the black-letter of §1962 (1) (c) which, in enumerating the statutory violations which may give rise to Racketeering, refers to 29 U.S.C. §186 as the statute dealing with "payment[s]" to labor officials. In addition, the entire legislative history of the Racketeering statute seems to indicate a revulsion at the mulcting of payments and not merely a pattern of wholly unsuccessful requests for payment. This case thus squarely

presents the issue of whether Racketeering may occur without proof of any payments of the sort otherwise forbidden by 29 U.S.C. §186. It also poses the problem of whether the defense in this case was deprived of a fair opportunity to argue the absurdity of a case based on bare demands for money, where the issue emerged only after the case has gone to the jury and after all counsel had summed up on a "payments made" theory.

POINT III

PROOF OF VENUE IN THE SOUTHERN DISTRICT WITH RESPECT TO COUNTS 8 AND 10, THE FALSE STATEMENTS COUNTS, WAS ABSENT.

Defendant was charged in Counts 7, 8, 9 and 10 with tax violations for the years 1971 and 1974. Counts 7 and 9 were "evasion" counts for each year (26 U.S.C. §7201) and Counts 8 and 10 were "false statements" counts for the same two years (26 U.S.C. §7206). The false statements counts were several times specifically attacked by defense counsel on venue grounds, because the proofs failed to establish that filing, or even signing of the returns, took place in the Southern District of New York (148a-149a, 230a-232a). The Court hesitatingly ruled that venue was proper and gave both §7206 counts to the jury (id.).

The venue cases dealing with income tax evasion (26 U.S.C. §7201) are different from those which deal with the crime of

false statements (26 U.S.C. §7206). In this case, defendant's accountant, Rhodes, prepared the defendant's returns in New York County and spoke there also with defendant in relation to the correctness of each proposed return (140a-142a; 894-5). While these features of the case may have supplied venue in relation to the crime of evading taxes (§7201), the crime of false statements depended on more strict criteria having to do with the place at which defendant subscribed or filed the returns. On this subject, there is no proof where defendant and his wife (who resided in Florida) signed the 1971 and 1974 returns. It is clear, however, that the 1971 return was mailed from Florida to Andover, Massachusetts (Murray, 137a-1,2,3, 138a-1). And, the 1974 return was received in Holtsville, Long Island (Murray, 138a).

Since defendant resided with his wife in Florida in 1971 and 1974, while defendant also had a New York apartment, it cannot be presumed that either return was signed in New York County. Nor were they filed here. One return was mailed from Florida to Massachusetts (1971), and the other 1974 was posted from a place not developed by the record to Holtsville, Long Island. Neither return, therefore, was proved to have been signed or filed in the Southern District of New York. In this situation, venue failed as to each count under 26 U.S.C §7206. The point thus raised is not academic since the defendant was fined \$5,000 on

each of the offending counts and the convictions under these counts may well have collateral impact (see cases, infra, pp. 46-52).

Venue is an element of the crime of false statements and must be proved (United States v. Gross [2 Cir. 1960] 276 F.2d 816, 818-9). In United States v. Slutsky, [2 Cir. 1973] 487 F.2d 832, this Court determined that a §7206 violation could be grounded in the Southern District although the returns in question had actually been filed in the Northern District of New York (id., at p. 839). The decision was predicated on the facts that the returns had been both prepared and signed in the Southern District. Since the statute (§7206) employs the terms "makes and subscribes any return", this Court had no difficulty in finding venue here since the returns had been prepared (made) here, and executed or signed (subscribed) here--thus satisfying both aspects of the statute.

The continuing offense doctrine cited by the Court (18 U.S.C. §3237) in Slutsky was found applicable with respect to a violation of the tax evasion statute (26 U.S.C. §7201), but was not applied to a violation of §7206 except insofar as the proofs otherwise satisfied the requirement of both making and subscribing to the returns in the Southern District. Slutsky, therefore, does not stand for the proposition that the continuing offense doctrine will apply where there is no proof of

signing or filing in this district. Of course, in this case, the only proof shown was that of preparation here, and signing at a place unknown, and filing outside of the district, and a mailing in one instance from Florida. As stated in United States v. White [2Cir. 1969] 417 F.2d 89, 94, the operative element of the crime is "the signature under oath".

Our view that the place of subscription will govern on venue is supported by United States v. Wyman, [D.C.W.D. Mo. 1954] 125 Fed. Supp. 276. The Gross case, supra, is not contrary authority, as Gross involved only the charge of tax evasion (\$7201).

POINT IV

THE MISDEMEANOR COUNTS FOR RECEIVING A PAYMENT (29 U.S.C. §186) WERE MULTIPPLICITIOUS TO THE RACKETEERING COUNT (18 U.S.C. §§1961, 1962). ELECTION AND/OR MERGER WAS ERRONEOUSLY DENIED. CUMULATIVE PUNISHMENTS WERE LIKEWISE ERRONEOUS.

Defendant was convicted of receiving payments as a labor official under Counts 2, 3, 4, and 5 (29 U.S.C. §186). These counts alleged the very same criminal violations as are embraced in Count 1, the Racketeering Count (18 U.S.C., §§1961, 1962). Count 1 constituted the greater offense as it charged a "pattern" of demanding and receiving payments from an employer. The string of misdemeanor violations described in Counts 2, 3, 4 and

5, was, thus, part of the larger pattern of payments described in Count 1, which latter count elevated these misdemeanors, by reason of their multiplicity, into the more aggravated crime denominated as Racketeering (18 U.S.C. §§ 1961, 1962).

Defense counsel requested that, as to the foregoing counts, there should be an election because the counts were multiplicitous--that is, they depended upon identical proofs to be established (158a-159a). This, the court refused to do (159a-160a), while also stating that the matter would be academic as no increased penalties would be imposed (160a). The court's ruling was wrong; and his assurance of no increased punishment was not observed at the time of sentence in regard to the fines which were cumulated on all accounts.

Since the proofs under Counts 2 through 5 necessarily wholly overlapped the proofs under Count 1, the misdemeanor counts should have been stricken, or the Government should have been required to make an election between those counts and the Racketeering count (United States v. Ploof, [2 Cir. 1972] 464 F.2d 116, 120-1; United States v. Stofsky, 409 F.2d 609, 617-618; Milanovich v. United States, (1961) 365 U.S. 551; United States v. Sperling [2 Cir. 1977] 560 F.2d 1050). Counsel vainly sought to have this election made (158a-159a)).

It was, therefore, also erroneous to enter judgments against the defendant upon the multiplicitous counts and these should certainly be vacated, if this were relief of a satisfactory nature (United States v. Belt, [8 Cir. 1975] 516 F.2d 873, 875; Clermont v. United States [9 Cir. 1970] 432 F.2d 1215, 1217; United States v. Golay [8 Cir. 1977] 560 F.2d 867, 869-70). However, even this relief would not be sufficient, because if the Government had been required to make an election, it is by no means clear that the election would have left the Racketeering count intact. It would be wholly presumptuous now to conclude that the Government would have insisted upon retention of Count 1, while allowing the four misdemeanor counts to be severed and dismissed. The Government might well have decided against putting all its eggs in one basket (under Count 1) and it might well have opted to sacrifice Count 1 in favor of the four other money demand (\$186) counts. In this situation, there is no proper appellate remedy except a retrial on all counts. (see Milanovich v. United States [1961] 365 U.S. 551, 554-5).

The same is true if the case had gone to the jury with instructions that Count 1 and Counts 2, 3, 4, and 5 were mutually exclusive. Faced with a choice of this sort, there is no way to tell whether the jury would have jettisoned Count 1, or kept it viable while rejecting the other counts (Milanovich v. United

States [1961] 365 U.S. 551; United States v. Belt [8 Cir. 1975] 516 F.2d 873, fn. #8, 875-6). Thus, a new trial on all counts would be necessary.

A fortiori, the sentences imposed under Counts 2,3,4 and 5 were improper. Even though the jail sentences imposed under these counts were concurrent with the one imposed under Count 1 (Racketeering) these convictions necessarily have impact on defendant's parole status, the habitual offender statutes, impeachment at future trials, and even the place of defendant's imprisonment. They should, therefore, be vacated because they will collaterally operate to defendant's prejudice (Benton v. Maryland, 395 U.S. 784, 791; United States v. Belt, *supra*, 516 F.2d at 875-6; Clermont v. United States, [9 Cir. 1970] 432 F.2d 1215, 1217; United States v. Holder, [8 Cir. 1977] 560 F.2d 953, 955-6; United States v. Lindsay, [8 Cir. 1977] 552 F.2d 263).

Separate, cumulative \$5,000 fines were imposed upon Counts 2, 3, 4, and 5. As these counts were wholly embraced in Count 1, the fines constituted improper multiple punishment for the separate included offenses (United States v. Sperling [2 Cir. 1977] 550 F.2d 1050; Clermont v. United States [9 Cir. 1970] 432 F.2d 1215; Dear Jung Wing v. United States [9 Cir. 1962] 312 F.2d 73, 75; Costner v. United States [4 Cir. 1943] 139 F.2d

429, 432). Of course, each of these fines should, likewise, be vacated.

POINT V

COUNTS 8 AND 10 CHARGING FALSE STATEMENTS ON TAX RETURNS SHOULD HAVE MERGED IN THE COUNTS FOR TAX EVASION. THE CUMULATIVE FINE ON COUNTS 8 AND 10 SHOULD BE VACATED ALONG WITH THE CONVICTIONS ON THESE COUNTS.

With respect to the tax evasion counts and the false statements counts, defense counsel requested an election of counts, prior to submission of the case to the jury, which the court refused (158a-160a). Nor did the court instruct that the counts were mutually exclusive. The jury found defendant guilty on both sets of tax counts for the years 1971 and 1974 and the court imposed consecutive \$5,000 fines on each and every tax count.

This Court has previously determined that the §7206 count is a lesser included crime under §7201 and, therefore, merges in the tax evasion count (United States v. Slutsky [2 Cir. 1973] 487 F.2d 832, 844-5; United States v. White [2 Cir. 1969] 417 F.2d 89). Although the fines imposed on all four tax counts do not exceed what the maximum cumulative §7201 fines could have been, we contend that the cumulative sentences imposed under §7206 are nonetheless improper.

In Slutsky and White, the Court found the merger points moot unless the fines for the lesser counts brought the total fine imposed to a greater figure than would be allowable on the more serious count. Slutsky and White should have no relevance, where, as here, defense counsel pointed out the fact of merger beforehand, so that a multiplicitous verdict was entirely avoidable. In Slutsky and White, it appears that defense counsel neglected to take this precaution, thus inviting dual verdicts.

Notwithstanding this important difference between the instant case and Slutsky, it is also the fact that in more recent times it has been ruled that the mere continued existence of a judgment on a multiplicitous, or merged count, involves prejudice to a defendant because of habitual offender statutes, impeachment potential in later cases, and parole status considerations (see supra, pp. 47-48; Benton v. Maryland, 395 U.S. 784, 791; United States v. Belt [8 Cir. 1975] 516 F.2d 873; Clermont v. United States [9 Cir. 1970] 432 F.2d 1215, 1217; United States v. Holder [8 Cir. 1977] 560 F.2d 953, 955-6).

The fines on counts 8 and 10 should, therefore, be vacated along with the convictions on those counts.

POINT VI

DEFENDANT'S CONVICTION UNDER THE HYBRID CONSPIRACY COUNT SHOULD HAVE BEEN ACCORDED MISDEMEANOR STATUS. JUDGMENT ON COUNT SIX, THEREFORE, SHOULD BE VACATED.

Defendant was charged with conspiracy under 18 U.S.C. §371 and was convicted on that count (No. 6) and sentenced as a felon to a concurrent three year term, of which 12 months is to be in actual custody, and the balance on probation.

Defendant was also sentenced on this count to a \$5,000 cumulative fine. This sentence was illegal and should be vacated.

The conspiracy charge against defendant alleged a two-fold purpose; 1) to violate the Racketeering Act [18 U.S.C. §1962(c)] and, 2) to violate 29 U.S.C. §186 in relation to the making of unlawful payments to a labor union official. While the Racketeering Act charge is a felony, the 29 U.S.C. §186 violation is but a misdemeanor. The cases are clear that where a conspiracy alleges crimes of differing gravity, in the absence of a special verdict, it shall be deemed that judgment is to be entered only upon the lesser crime (United States v. Quicksey [4 Cir. 1976] 525 F.2d 337, 340-1; United States v. Amato [D.C. N.Y. 1973] 367 F.S. 547, 549).

Accordingly, defendant was entitled to be sentenced under the conspiracy count as a misdemeanant, the predicate statute being 29 U.S.C. §186 which carries as a penalty a maximum of

one year in jail and/or a \$10,000 fine. Although the fine, actually imposed upon defendant here was less than the maximum fine allowed, and the jail term was not in excess of the allowable one (1) year sentence permitted by subdivision d of §186, defendant was, nonetheless, convicted of a felony rather than a misdemeanor, and was saddled with a concurrent two year term of probation.

Section 186 makes no provision for a sentence of probation in addition to a maximum jail term. Such a sentence is excessive, as is the felony label presently affixed to defendant on this count (§18 U.S.C. §1; §18 U.S.C. §3651). Notwithstanding the concurrent sentence exception, the continued existence of this "felony" conviction against defendant will necessarily involve detriments which warrant a vacatur of both the judgment and sentence upon this count (Benton v. Maryland [1969] 395 U.S. 784, 791-3; United States v. Belt [8 Cir. 1975] 516 F.2d 873, 875; Clermont v. United States [9 Cir. 1970] 432 F.2d 1215, 1217)).

POINT VII

18 U.S.C. §§1961 AND 1962 ARE EX POST FACTO LAWS VIOLATIVE OF ARTICLE I, §9, CLAUSE 3 OF THE UNITED STATES CONSTITUTION. MOREOVER, DEFENDANT'S PROSECUTION FOR ACTIVITIES IN 1968 WAS VIOLATIVE OF THE STATUTE OF LIMITATIONS.

Defendant interposed a written motion to dismiss the indictment

contending that the Racketeering statute, 18 U.S.C. §§1962 and 1962, was constitutionally defective for being an ex post facto law, and that the statute, in this case, depended in a substantive way upon violations of law which, in any event, violated the statute of limitations. The court entered a written decision denying the motion (12a-23a). Because the points raised below are still undecided in this Circuit, we press them again. The defendant was charged in Count 1 under 18 U.S.C. §§1961 and 1962 with having received unlawful payments as a union official on seven (7) occasions in 1968 and 1969 and on seven (7) other occasions from September, 1971, through December 13, 1971⁶. The receipt of those payments was alleged to constitute a pattern of Racketeering Activity under 18 U.S.C. §1961(5)--a crime made out by proof of at least two acts of Racketeering Activity taking place within ten (10) years of each other, with one such act occurring after the effective date of the statute (October 15, 1970).

The defendant was charged under Count 1 with having received unlawful payments as a union official in 1968 and 1969. As the defendant was not indicted until December, 1976, these 1968 and 1969 transactions would normally fall outside of the five (5) year statute of limitations applicable in cases of federal non-

6. In a superseding indictment, additional payments in 1974 were alleged, and four tax counts for the years 1971 and 1974 were added.

capital felonies (29 U.S.C. §186; 18 U.S.C. §3282). We contend therefore, that the criminal offenses allegedly committed by the defendant in 1968 and 1969 should not have been prosecutable in 1976, and at the trial, by virtue of the Statute of Limitations which we vainly invoked in our pre-trial motions.

It is urged by the Government, however, that the crime for which the defendant was prosecuted under 18 U.S.C. §§1961 and 1962 is that of Racketeering Activity--a supposedly different crime from the bare act of receiving unlawful payments as a union official from an employer which receiving is proscribed by 29 U.S.C. §186. Manifestly, this alleged difference in crimes is semantic only, since both statutes require the same basic activity (receiving a payment from an employer), albeit 18 U.S.C. §§1961, 1962 makes two (2) instances of such conduct within 10 years an ostensibly different and more grave crime; that is Racketeering Activity.

The Government's position overlooks the fact that proof of receiving illegal payments in 1968 and 1969 was an integral part of its case under the alleged Racketeering Activity rubric. The offering of such proof under Count I was not merely to prove a pattern, lack of mistake, motive, or to establish identity of the defendant as the culprit, but to prove the prior acts themselves, in a substantive way, as constituent parts, albeit

earlier ones, of the crime of Racketeering Activity which is now defined to require a multiplicity of acts constituting a "pattern". Avoidance of the Statute of Limitations should not depend upon such a transparent device.

The reach of §§1961 and 1962 is also defective for these statutes, if applied to defendant's 1968 and 1969 activities, will have an ex post facto effect (U.S. Const. Art. I, §9, Cl. 3). By treating defendant's activities in years prior to the passage of the Racketeering Activity statute as lawless incidents to be proved on the case in chief, §1961(5) of Title 18 is defining crime retroactively. Defendant's earlier activities, predating passage of the 1970 Statute in question, are by such statute defined for the first time as "Racketeering Activity" and are being sought to be punished as such for the first time, even though in 1968 and 1969 such a crime--"Racketeering Activity"--in relation to receiving payments from employers was not known to our laws.

The decision of the United States Court of Appeals for the 9th Circuit in United States v. Campanale, 518 F.2d 352, 364 concludes that §1961(5) of Title 18 is not ex post facto--since the earlier, pre-statutory conduct, is said not to be punished as such. It is urged by the Campanale court that such antecedent conduct is merely a factual basis for making the

post-statutory conduct of the identical nature much more severely punishable. Certainly, this type of reasoning aims at avoiding the ex post facto problem by simply ignoring the fact that it is necessary to plead and prove acts of misconduct which pre-date the statute. It is said that these acts are not being punished; it is only those occurring after the effective statutory date that are punished--the earlier acts being described, in effect, as the yeast which raises the cake. Such reasoning is a mere play on words. That "play" was adopted below.

What is perfectly clear is that, in 1968, the receipt of payments from an employer by a union official was not "Racketeering Activity"--it was merely a violation of 29 U.S.C. §186, and involved punishment consequences far less grave than those imposed by 18 U.S.C. §1963 (\$25,000 fine; 20 years imprisonment, or both; and forfeitures).

Thus, by a statutory change effected in 1970 creating the new crime of "Racketeering Activity", Congress sought, unconstitutionally, to accord new and different criminal consequences to prior activity by the defendant which would ordinarily have been time-barred from prosecution. Laws, such as the Act of 1970, which make acts criminal which, when done, were not criminal, or those which increase the seriousness of, or provide a greater

punishment for, criminal acts over that which obtained when the acts were committed, fall within constitutional condemnation as being ex post facto (United States v. Henson [CA D.C. 1973] 486 F.2d 1292, 1305; United States v. Sherpix [CA D.C. 1975] 512 F.2d 1361, 1365). As has been appropriately stated not too long ago by the United States Supreme Court in Bouie v. City of Columbia (378 U.S. 347, at p. 353):

"An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime or makes it greater than it was, when committed.' Caler v. Bull, 3 Dall, 386, 390" (emphasis added; see also Kring v. Missouri, 107 U.S. 221, 235).

And, as is further stated in the Bouie case, supra, at p. 354:

"The fundamental principle [is] that 'the required criminal law must have existed when the conduct in issue occurred' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59. . ." (Emphasis added).

In the instant case, the Racketeering Activity statute of 1970, treats an earlier violation of 29 U.S.C. §186, which would clearly be time-barred, as criminally actionable under the instant indictment, and even makes it more seriously cognizable in terms of penalties than if it had been originally prosecuted under the Taft-Hartley Act (29 U.S.C. §186). Title 18 U.S.C. §§1961, 1962, thus makes defendant's pre-1970 crimes more "aggravated", or

"greater" than when they first occurred, and does so by applying itself to acts which took place long before the "Racketeering Activity" statute went into effect. On ex post facto grounds, therefore, all of Count I and substantial portions of Count III should have been stricken and dismissed. It was error of the first magnitude to allow any of these 1968 and 1969 acts of the defendant to form any part of the substantive or conspiratorial allegations of the indictment or the proof at trial*. Indeed, the proofs on this subject took up a large part of the record and were so pervasive as to infect and undermine every count in the case.

POINT VIII

REVERSIBLE ERROR OCCURRED DURING THE PROSECUTOR'S SUMMATION REMARKS WHICH REFERRED TO DEFENSE COUNSEL'S ALLEGED PERSONAL KNOWLEDGE OF GUILT. THE SUMMATION IMPROPERLY VOUCHERED FOR THE PROSECUTOR'S OWN VERACITY AND WAS ALSO UNDULY INFLAMMATORY.

The Government's summation was improper and highly prejudicial with respect to comment made by the prosecutor which, in effect, stated to the jury that defense counsel, himself, did not really believe in his own defense of appellant. More specifically, the summation error arose in connection with the proof offered by Beverly Hackmann, the Government's in witness, to the effect that in the Spring of 1975, defendant telephoned Hackmann regarding an investigation respecting

* Evidence of pre-1970 payments could not constitute proof of "Conspiracy to Commit Racketeering" in 1968 and 1969, as no such crime existed in those years.

certain "payoffs" by United Brands. During their conversation, defendant allegedly told Hackmann that he had heard from people in Washington that the company's "finance man was talking" (35a-36a). Hackmann told defendant that his [Hackmann's] own activities were also being scoured. Defendant then allegedly told Hackmann, "Remember Chink, don't forget" (36a).

Hackmann testified that it was his understanding that defendant was telling him to "Remember Chink" in order to persuade him to say that any monies paid out by Hackmann which were inquired into by the Government should be attributed to "Chink" Henry, a then deceased labor official from New Orleans (37a-38a). The implication of this testimony was that defendant was telling Hackmann to blame a dead man with taking money from United Brands--but to leave defendant's name out of the matter.

In order to bolster his testimony, Hackmann referred to a torn slip of paper (Exhibit 1K id. [194], Exhibit B) which he said constituted the contemporaneous notes of his conversation with the defendant. The note made no mention of the defendant.

On cross-examination, defendant's counsel attempted to discredit Hackmann's report of the conversation by showing that the note (Exhibit id. 1K; Exhibit B) was possibly a recent fabrication (39a-55a), since it was not surfaced by Hackmann

until after the trial had begun. Moreover, the note did not mention defendant by name and was torn in such a fashion, as perhaps, to have once indicated additional writing possibly involving a person other than the defendant.

On redirect examination, the prosecutor sought to bolster Hackmann by asking him if he had told his lawyer about the telephone call from defendant at about the time the alleged call occurred (56a-60a). Hackmann stated that he had, indeed, informed his lawyer, John Tighe, Esq. about the call (60a).

Thus, the stage was set for either defense counsel or the Government to call John Tighe as a witness--but neither side was up to pushing the matter. The defense attempted to blunt the issue by developing the point that the suggestion to blame "Chink" came not from the defendant, but from Hackmann's erstwhile superior, Wilbur Lauer, who had been under investigation in relation to payoffs by United Brands at the same time as Hackmann.

Thus, during the cross-examination of Wilbur Lauer, the United Brands Vice-President to whom Hackmann said he reported certain of defendant's demands for money, defense counsel sought to show that defendant and Lauer met and spoke in 1975 with each other during a period prior to the indictment when United Brands, itself, was being investigated (76a-80a). Indeed

they had met and spoken about the investigation of United Brands (77a-78a). While Lauer admitted that Hackmann had told him about giving money to "Chink" Henry, he denied that he [Lauer] had told Hackmann to blame the need to make payments on "Chink" Henry (78a). There the matter rested without either side calling Hackmann's lawyer Tigue.

On summation, defense counsel argued to the jury that the note made by Hackmann did not mention defendant and could well have been a notation of a conversation with Lauer who, like Hackmann, and United Brands, was being investigated by the S.E.C. and the United States Attorney (170a-178a). Defense counsel also argued that if Lauer was not the inspiration for the anonymous "blame it on" Chink note, any one of several other United Brands executives could have suggested the same ploy (id.).

Against this background, the prosecutor summed up stating that defense counsel did not call Hackmann's lawyer as a witness to test Hackmann's claim that he had told his own lawyer of defendant's advice to blame "Chink" (177a-179a). The lawyer, Tigue, was arguably available to both sides and no comment about the failure of the defense to call Tigue was in order. The Government could, as well, have called Tigue. But, what is far worse, is that the prosecutor went on to state that defense counsel Feitell did not call lawyer Tigue as a witness because Feitell,

himself, did not disbelieve the Government's proof and knew that the defense position on the matter was "groundless" and false (178a-179a).

Thus, prosecutor Wing stated (178a-179a):

"For Pete's sake. Forget this business about how it must have been Lauer who made this call. Of course, is there any proof of that. Did Mr. Lauer tell you that or did Mr. Hachmann tell you that or is there any proof from any witness anywhere that that happened?

No, that is like a lot of what Mr. Feitell told you, basically, groundless. If he wanted some proof, if he really believed that, if he really thought that that's what happened, ladies and gentlemen, do you remember Hachmann said after he got the call he called his lawyer and told him about it. Why didn't Mr. Feitell put that lawyer on the stand to explain how Hachmann mentioned that Lauer had called to tell him to 'Keep Chink Henry in mind' ". (Emphasis added.)

Counsel for the defendant interposed strong and timely objection to the remarks of the prosecutor, particularly those which accused defense counsel of not believing in his own client's cause (181a-183a). He described the rebuttal portion of the Government's summation as "very, very unfair. . .overstepped the bounds. . .", and pointedly objected to the reference to his own alleged lack of faith in the defense position (181a,183a). The trial Court made short shrift of the defense complaint describing the Government's conduct as "fair comment" (183a).

We contend that the Government's summation, as shown above, constituted reversible error. The note that Hackmann claimed to have written to memorialize his alleged conversation with defendant, and Hackmann's testimony regarding "Chink", were damaging to the defense. The note (Exhibit B) was admissible as past recollection recorded and supplied what the Government's case sorely needed--that is, some arguably extrinsic physical evidence to shore up Hackmann's self-serving and otherwise barren story. In this setting, it was reversible error for the prosecutor to throw into the breach the credibility and integrity of defense counsel by urging upon the jury that defendant's attorney himself did not believe that Hackmann had conjured up the "blame it on Chink" story after speaking with Lauer or others who knew that "Chink" had been getting money from United Brands.

It is reversible error for a prosecutor to sum up in words charging that his adversary knows that the defendant is guilty, or that a certain legal stance taken by defense counsel is being assumed contrary to his personal knowledge derived in the course of his service as counsel for the defendant (People v. Tassiello [1950] 300 N.Y. 425; People v. Fluker [2d Dept. 1976] 51 A.D. 2d 1045, 1046). When a prosecutor states to a jury that defense counsel knows where the truth is in a case,

he is improperly making himself an unsworn witness and supporting his case by his own veracity and position (Berger v. United States, 295 U.S. 78, 88; and see Code Prof. Responsibility, DR 7-106, subd. [c]; paragraphs 2, 3, and 4). In the instant case, as in Berger, supra, p. 88, the prosecutor attributed to defense counsel the concoction of a false defense and specifically charged defense counsel with knowledge that his position was both untenable, and also known by him [defense counsel] to be false. In the instant case, the Government's attorney improperly told the jury that defense counsel did not himself believe in the purport of his own questioning of Lauer respecting the matter of "Chink", and that defense counsel knew that if he called lawyer Tigue, Tigue would corroborate Hackmann's story of a telephone call from defendant relating to "Chink" (1296-7). The vice of this is perfectly clear. The prosecutor was injecting his own veracity on the issue of what defense counsel knew and felt about a key issue in the case. And the prosecutor was obliquely testifying that Tigue, if called, would support Hackmann. These errors, objected to by the defense, warrant a reversal and new trial since the matter related to a piece of prosecution evidence necessary to the success of its case.

The record reveals many other galling instances of prejudicial prosecutorial comment which were also timely objected to by the defense (162a, 167a-168a, 164a). The summation tirade of the Government was an outright appeal to jury passion where the trial assistant repeatedly referred to the defendant as a "crook" involved in a "shakedown" (160a-1, 161a-162a). Then the prosecutor deliberately sought to inflame the panel by connecting the defendant's activities to what was then appearing in the newspapers relative to corporate bribery overseas, unauthorized corporate political contributions, and misconduct of various sorts wholly unrelated to the case on trial. Thus, the prosecutor inveighed that (161a):

"This kind of shakedown by a corrupt union official ... is the kind of thing that breeds immorality in the business world that you read about every day" (emphasis added).

He further blamed the defendant for the ills of the world by stating that (162a).

"... it is people like Fred Field who are responsible for causing [corporate] slush funds".

These comments were meant to enrage the jury by giving the limited facts of the case as it affected the one defendant on trial, a broader significance relating to supposed widespread corporate corruption ostensibly generated by union

officials of the defendant's stripe. It was wholly improper to denominate the defendant's alleged actions in the one case on trial as the underlying and prototype cause for all corporate corruption, bribery, and wrongdoing. The defendant was thus obliquely identified to the jury as a master scoundrel, a public enemy, and for the benefit of the working jurors, a traitor "to the ideals of unionism" (162a). Few defendants are subjected to this type of verbal lashing going so far beyond the narrow facts of this very close case.

In another clearly improper resort to his own veracity as the prosecutor, the Government's trial counsel both indirectly commented on defendant's failure to testify, and suggested in the very same breath that there was not a person alive who could contradict the testimony of his major witness Hackmann. Thus, the prosecutor stated (164a).

"There isn't a man or woman in the world
who could come into the court room and
take the stand and tell you that they were
with Fred Field when Hachmann said he was
paying him" (emphasis added).

This statement went wholly outside of the record and tended to project the prosecutor as a witness to the facts.

Elsewhere, Government counsel attacked the attorney for the defense by boldly accusing him of fabricating a false defense insofar as the defense had urged that Hackmann

pocketed monies because of concern that new management in the person of Eli Black would eventually dismiss him as labor counsel. Thus, the prosecutor advised the jury: (165a)

"The reason that Mr. Feitell [defense counsel] told you about that defense, the grand scheme, that Eli Black terror scheme, the reason that we have that defense in the case, ladies and gentlemen, is because there is no intelligible way to explain why back in 1971 or back in 1968, years before any of us thought of any of us being right here, why at that time Hachmann was telling people that Field was leaning on him for money. And so that you may find that that has to have happened, and so Mr. Feitell has to give you an explanation as to why, and that's why we have that defense in this case" (emphasis added).

It is improper for an attorney to urge upon a jury that a particular argument or contention made by his adversary is pure fabrication by such counsel which the latter has devised solely to circumvent other facts. Such an attack is tantamount to placing the veracity of the government's attorney against the probity of his adversary (United States v. Burse, [2 Cir. 1976] 531 F.2d 1151, 1154; United States v. Gonzalez, [2 Cir. 1973] 488 F.2d 833, 836; United States v. White [2 Cir. 1973] 486 F.2d 204; see also People v. Rogers, [2d Dept. 1977] 399 N.Y.S. 2d 151, 153).

The prosecution also made a point of attacking defense counsel. Thus, he went on a vendetta against defense counsel

by mentioning him deliberately and often, and sarcastically by name, no less than 38 times during the summation. Harping repetition by name, of one's adversary in an often disparaging fashion is calculated basically to demean and not merely to identify.

Another important instance of prejudicial comment meant to inflame appears at p. 162a. Here, the prosecutor went beyond the charges in the indictment to picture defendant, over objection, as being unfaithful to his union membership.

"Perhaps this case is even more important for another reason. We are dealing here with a very high union official of a very large union, 100,000 men or more. And the conduct that we have proved in this courtroom demonstrates a blatent [sic] and clear abuse of trust, a man taking gross advantage of his office to line his own pockets" (emphasis added).

And, again projecting his own veracity in support of the Government's witnesses, the prosecutor clearly underscored his own tested belief in them by stating (165a):

"Why would they [Government's witnesses] be coming in here and telling me a lie about this if that's what's going on?"

Later on, commenting about a defense contention, the prosecutor stated (174a):

"That is a phony defense. That is a smoke-screen to confuse you on the facts of this case."

And, as to another line of proof which the defense attempted to develop, the Government counsel derided it, thusly (175a):

"That claim is just as much baloney
.... baloney" (emphasis added).

(See United States v. Burse, supra; United States v. Gonzalez, supra).

With respect to whether or not Hackmann had reported to superiors certain money requests by defendant, the prosecutor referred generally to his company witnesses who testified regarding their conversations with Hackmann. Since these witnesses [who were accomplices] supported Hackmann's version, the prosecutor argued (176a):

"Too many other people heard the same thing. It had to have happened" (emphasis added).

Thus, the prosecutor again interposed his own veracity into the case. And finally, the prosecutor made his parting desperate shot in this, the last case he was scheduled to try before leaving the office of the United States Attorney (180a):

"If you find that this defendant has committed a crime, and I submit to you that the evidence is overwhelming that he did. If you do not convict him what man or woman can say that there is any justice"* (emphasis added).

The conduct of the prosecution in his summation as shown

* This final inflammatory statement alone would warrant a reversal in this case.

above should be decisively scored. In a close case, such as this, which depended almost entirely upon the word of a single Government witness, the inflammatory and improper statements of Government counsel supplied the necessary increment to win a desperately wanted conviction. Such conduct warrants a reversal and a new trial.

CONCLUSION

The judgment of conviction should be reversed. Alternatively, the sentences and fines should be vacated and set aside as indicated.

Respectfully submitted,

LAWRENCE K. FEITELL
Attorney for Appellant

Dated: New York, New York
February 28, 1978

COURT OF APPEALS-SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

FRED SPENCER, JR., - against -

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York**

ss.:

I, **JAMES A. STEELE** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
112 West 136th Street, New York, New York
That on the **1st** day of **March** 19 **78** at **St. Andrews Plaza N.Y. N.Y.**

deponent served the annexed

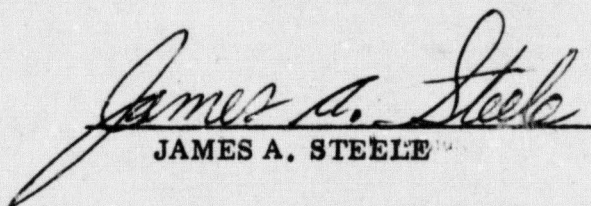
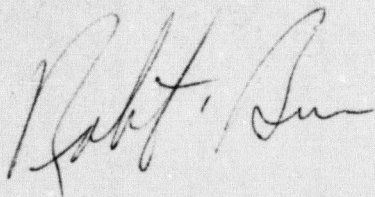
Robert Fiske, Jr.

upon

Brief

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this **1st**
day of **March**, 19 **78**


JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

